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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1435

LOCAL 336, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

vs.

GTE-AUTOMATIC ELECTRIC COMPANY,
Respondent.

BRIEF OF GTE-AUTOMATIC ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent, GTE-Automatic Electric Company, respectfully urges that the Petition for Writ of Certiorari filed herein be denied.

OPINIONS BELOW.

The Order of District Judge Leighton of the United States District Court for the Northern District of Illinois dismissing the Petition of Local 336, International Brotherhood of Electrical Workers, AFL-CIO, is reprinted as Appendix B to the Petition for Writ of Certiorari.

The unanimous and unpublished Order of a panel of the United States Court of Appeals for the Seventh Circuit affirming the Judgment of the District Court is reprinted as Appendix A to the Petition for Writ of Certiorari.

JURISDICTION.

The Jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the District Court and the Court of Appeals on review erred in dismissing the Petition to Order Arbitration on the basis that all issues raised by the Petition to Order Arbitration had been mooted by the decision of the National Labor Relations Board in *GTE-Automatic Electric Incorporated and Local No. 336, International Brotherhood of Electrical Workers, AFL-CIO*, 226 NLRB 1222 (1976), and by subsequent collective bargaining between the parties.

STATUTES INVOLVED.

This action involves the United States Code of Arbitration, Title 9 U. S. C. § 4, and Section 301 of the Labor Management Relations Act, Title 29 U. S. C. § 185(a).

STATEMENT OF THE CASE.

This case arose upon the filing by Petitioner of a Petition to Order Arbitration under 9 U. S. C. §§ 1, 4, 5 and 6 and under Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185 *et seq*. The issues to be arbitrated are stated in the Petition To Order Arbitration as follows:

1. The "question of the Union's right and the Company's obligation to bargain over wages, hours and working conditions of members assigned to work in foreign countries."
2. The Company's "obligation to bargain with respect to the effect these members (the members of the bargaining unit so assigned in foreign countries) would have on other members of the bargaining unit when they return to the States."[1]

Petitioner now petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to obtain review of that Court's Order of November 21, 1978, wherein the court, in affirming the Judgment of the District Court, held that the issues raised by the Petition to Order Arbitration had been resolved by a decision of the National Labor Relations Board and by subsequent bargaining between the parties. The Seventh Circuit further held that the issue the Petitioner now seeks to submit to arbitration, the status of an individual terminated from his employment while working in a foreign country, is a new issue which was not raised in the pleadings nor had the Petitioner demonstrated that it had "availed itself of the grievance procedure under the collective bargaining agreement, which is prerequisite to arbitration, or a petition to order arbitration." (The unpublished decision of the Seventh Circuit is contained at the Appendix, A1 to A5, of the Petition filed with this Court).

COUNTERSTATEMENT OF FACTS.

Respondent (also referred to as the "Company") is engaged in the manufacture and installation of telephone and other types of communications equipment. The Petitioner (also referred to as "Local 336") is the bargaining representative for a group of telephone equipment installers in various classifications employed by Respondent. Over the years the parties have entered into a series of collective bargaining agreements regarding the wages and working conditions of those installers.

On March 2, 1976, Petitioner filed its Petition to Order Arbitration, pursuant to Section 301 of the Labor-Management Relations Act, 29 U. S. C. § 185 *et seq*., and the United States

1. Noted in the Court of Appeals decision contained in the Petition, Appendix A, p. 3.

Code of Arbitration, 9 U. S. C. §§ 1, 4, 5 and 6. As set forth in paragraph 8 of that petition, and appendices "B" and "D" attached thereto, Petitioner demanded arbitration under the collective bargaining agreement between the parties of the "question of the Union's right and the Company's obligation to bargain over wages, hours and working conditions of members assigned to work in foreign countries." The Union also demanded arbitration of the "Company's . . . 'obligation to bargain with respect to the effect these members (the members of the bargaining unit so assigned in foreign countries) would have on other members of the bargaining unit when they return to the States.' "[2]

Following the filing of the Petition to Order Arbitration, the Respondent filed with the National Labor Relations Board a petition seeking clarification of the bargaining unit represented by Petitioner, pursuant to Section 9(b) of the National Labor Relations Act, as amended, 29 U. S. C. § 185 *et seq.* A hearing was held and on November 30, 1976, the NLRB granted Respondent's Petition and ruled that installers working in foreign countries are not encompassed within the unit represented by the Petitioner and are not covered by the collective bargaining agreement between the parties. *GTE-Automatic Electric Incorporated, and Local No. 336, International Brotherhood of Electrical Workers, AFL-CIO,* 226 NLRB 1222 (1976).

Thereafter, on November 11, 1976, following the NLRB decision, the parties reached agreement on the effects which result from having persons leave the bargaining unit to work in foreign countries and subsequently return to the United States. (See agreement on "effects," quoted in the Court of Appeals decision contained in the Petition, Appendix, A4.)

On the basis of the Board decision and the agreement on effects, Respondent moved to dismiss the Petition to Order Arbitration on the basis that as a result of the NLRB decision and the agreement reached between the parties, the issues raised by the Petition were now moot. On January 31, 1978, the Honorable Judge George N. Leighton granted Respondent's Motion to Dismiss, holding that "[i]t appears from the record that all issues raised by the Petition for Arbitration have been mooted by the decision of the National Labor Relations Board in *GTE-Automatic Electric Incorporated and Local No. 336, International Brotherhood of Electrical Workers, AFL-CIO,* Case No. 13-UC-87 (November 30, 1976), and by subsequent collective bargaining between the parties" (Petition, Appendix A6).

2. Petition to Order Arbitration, contained in the record filed with the United States Court of Appeals for the Seventh Circuit, at A5-10.

The Seventh Circuit Court of Appeals unanimously affirmed the decision of the district court that all issues raised in the Petition to Order Arbitration had been resolved and that the Petition to Order Arbitration should be dismissed. Noting that the Petitioner was now seeking to arbitrate an issue separate and distinct from those raised in the Petition to Order Arbitration and that Petitioner had never sought to amend the pleadings to encompass the new issue, the Seventh Circuit stated:

> "We affirm the court's judgment. The NLRB determined the first issue, bargaining rights of foreign employees, and the parties negotiated the second, namely the effect that foreign assignments have on the remainder, or other members, of the bargaining unit. The Union on appeal has sought to add a new issue: the rights of employees who prematurely leave their foreign assignment or are discharged from foreign employment. The pleadings were never amended nor sought to be amended to encompass this new issue. Board Member Jenkins' dissent in the Board case did not change the issues before the district court. Equally importantly, the Union has not availed itself of the grievance procedure under the collective bargaining agreement, which is prerequisite to arbitration, or a petition to order arbitration. ***Republic Steel***

Corp. v. *Maddox*, 379 U. S. 650 (1965); *Vaca* v. *Sipes*, 386 U. S. 171 (1967)."

Judgment affirmed.

(Petition, Appendix, A4-5.)

ARGUMENT.

The Petition For Writ of Certiorari Suggests No Issues Which Warrant Review for Any of the Reasons Set Forth in Rule 19 of the Supreme Court Rules.

The issues raised in the Petition for Arbitration are set forth at pp. 2-3 *supra*. Apparently conceding that these issues have been resolved and that it no longer seeks an order compelling their submission to arbitration, Petitioner nevertheless argued before the Court of Appeals and now to this Court that it should be entitled to an order compelling the submission to arbitration of a separate and distinct issue.[3] At no time, however, has Petitioner ever sought to amend the pleadings to encompass this new issue, preferring instead to argue that a court should be without authority to consider the scope or mootness of the issues raised in a Petition to Order Arbitration. The Petitioner's position, however, flies in the face of all established notions as to the appropriate role of a court entertaining a Petition to Order Arbitration and, if adopted, would make a mockery of the equity powers of a court in connection with actions of this nature.

Thus, it has long been established that a court, before issuing an order compelling arbitration, must find, as a matter of law, that the petitioner's claim is governed by the contract involved and is within the scope of the agreement to arbitrate. *United*

3. That the Petitioner now seeks the submission to arbitration of a separate and distinct issue from those raised in the Petition to Order Arbitration is readily apparent. The generic issues raised in the Petition to Order Arbitration are noted in the Court of Appeals decision at A3. In its Petition For Writ, however, the Petitioner describes the issue it seeks to submit to arbitration as an individualized issue, relating to the termination and status of a certain (unnamed) individual (P. Br. 7-9).

Steelworkers of America v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). Such a determination clearly can only be made following a review of the contract involved and an evaluation of the scope of the issues raised. To contend that the court is without authority to consider the scope of the issues is to ignore this fundamental requirement.

Similarly, it is also well established, contrary to the Petitioner's contentions, that the party petitioning for arbitration must demonstrate that it has fulfilled its own contractual commitments before seeking equitable relief in the courts to compel arbitration. A petitioner which has not properly availed itself of the contractual grievance procedure for the resolution of its claim has failed to live up to the terms of the contract on its own part and has no grounds to request a court to compel arbitration. *Republic Steel Corporation* v. *Maddox*, 379 U. S. 650 (1946); *Dill* v. *Greyhound Corporation*, 435 F. 2d 231 (6th Cir. 1970), *cert. denied*, 402 U. S. 952 (1970); *OCAW Local 2-477* v. *Continental Oil Co.*, 524 F. 2d 1048 (10th Cir. 1975); *Oil Workers* v. *Oil City Brass Works*, 83 LRRM 2959 (E. D. Tex. 1972), *aff'd.*, 479 F. 2d 1048 (5th Cir. 1973).

In the instant case the Petitioner has never demonstrated that it has availed itself of the grievance procedure prior to seeking an order compelling arbitration of the new issue it raised subsequent to the filing of its Petition to Order Arbitration. In contending as it does at pp. 7-8 of its Petition to this Court that the lower court was in error in not developing a record that Petitioner had not complied with the grievance procedure, Petitioner improperly attempts to shift from itself to the court the burden to properly develop a record to justify the issuance of an order.

Equally absurd is Petitioner's claim that the courts should be without authority to consider the mootness of the issue(s) raised. That veiwpoint utterly ignores the long and continuing history of Supreme Court adherence to the jurisdictional limita-

tions created by Article III of the Constitution. The Supreme Court has interpreted Article III as establishing the minimal jurisdictional requirements for all federal courts. *Flast* v. *Cohen*, 392 U. S. 83 (1968). Thus, the Constitution limits the scope of federal judicial power to those cases in which an actual "case or controversy" is present. *Benton* v. *Maryland*, 395 U. S. 784, 89 S. Ct. 2056 (1969); *S. E. C.* v. *Medical Committee for Human Rights*, 404 U. S. 403, 92 S. Ct. 577 (1972); *O'Shea* v. *Littleton*, 414 U. S. 488, 94 S. Ct. 669 (1974).

The Court has noted on many occasions that federal courts must strictly adhere to the Article III limitation. As stated in the case of *United States* v. *Richardson*, 418 U. S. 166, 94 S. Ct. 2940 (1974):

> "As far back as Marbury v Madison, 1 Cranch 137, 2 L. Ed. 60 (1803), this Court held that judicial power may be exercised only in a case properly before it—a 'case or controversy' not suffering any of the limitations of the political-question doctrine, *not then moot* or calling for an advisory opinion." (418 U. S. at 171.) (Emphasis added.)

It is therefore clear that under the terms of Article III of the Constitution federal courts are without authority to consider any aspect of a controversy once it becomes moot.[4] The Petitioner's contention that a court should ignore the issue of mootness flies in the face of this fundamental legal principle.

In sum, it should be emphasized that Respondent does not seek to disturb the well established principle that the primary responsibility to apply a contract and to rule upon the merits of a claim rests with the arbitrator. By the same token, if adopted, Petitioner's logic would strip the courts of all responsibility in considering petitions to order arbitration and would reduce the role of courts to mere rubber stamps in such matters. Clearly the courts must retain the responsibility to determine that the issues raised are subject to the contract and to the agreement to arbitrate and that a "case or controversy" exists prior to compelling the parties to submit the issues to arbitration. The Petitioner's arguments in this regard are clearly without merit and do not warrant review for any of the reasons set forth in Supreme Court Rule 19.

4. *See Powell* v. *McCormack*, 395 U. S. 486, 89 S. Ct. 1944 (1969).

CONCLUSION.

Relying upon the liberal policy in favor of arbitration, the Petitioner in this matter has improperly sought on appeal to amend the issues raised in its Petition To Order Arbitration and contends that an order should be issued compelling the Respondent to submit a new and distinct issue to arbitration. The Court of Appeals properly restricted its reviews to the issues raised in the Petition To Order Arbitration and held that the lower court was correct in concluding that an order compelling arbitration was not justified. The Court of Appeals also properly held that the issue Petitioner now seeks to arbitrate is new and distinct from those raised in the Petition To Order Arbitration and that Petitioner should not be entitled to use the original Petition as a vehicle to seek an order compelling arbitration of a new and distinct issue. This is especially true when, as here, Petitioner has not properly pled that it has fulfilled its own contractual obligations with regard to this new and distinct issue. The Petition for Writ of Certiorari should now be denied and the decision of the United States Court of Appeals for the Seventh Circuit should be allowed to stand.

Respectfully submitted,

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